

A **Pelangi Barat Sdn Bhd v
Arab-Malaysian Bank Bhd**

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-515
OF 2001

SYED AHMAD HELMY JC

B 29 OCTOBER 2001

Banking — Security for advances — Non-fulfillment of conditions precedent to provide security — Whether discharged remaining security — Whether non-disbursement of loan affected validity of security given

C The respondent bank had granted a term loan facility of RM4m and an overdraft and trade facility of RM3.25m to a company called HC Industries Sdn Bhd ('the company'), and as security therefore obtained two third party legal charges over the applicant's land held under EMR 1112 Lot 983 Mukim Kota Tinggi, Daerah Kota Tinggi, Johor ('the charged property'). The loan agreement and the charges were executed in 9 September 1996. It was a term of the loan agreement that the company was also to furnish as security, the property held under HS (D) 177837 Lot PTD 52060 Mukim Tebrau ('the company's property'). Only the overdraft and trade facility was utilized (in September 1996) in the sum of RM750,000. The company had defaulted in the repayment of the overdraft and trade facility and the respondent had obtained judgment against the applicant for the outstanding sum of the overdraft and trade facility in the sum of RM952,122.49 as at March 2001, as per the statement of account exhibited as A8 in encl 5. The applicant applied essentially for a discharge of the two charges over the charged property and the return of the title deeds. The applicant contended that the failure of the furnishing of security of the company's property discharged the charged property from remaining as security, given that the loan agreement expressly subjected disbursement of the loan to, inter alia, the condition precedent of the furnishing of security of the company's property. The issue was whether the cancellation of the purchase by the company of the company's property discharged the applicant's charge of the charged property to secure the term loan facilities and the overdraft and trade facilities.

Held, dismissing the application in encl 3:

H (1) As to the validity of the first charge in exh A5, the non-disbursement of the term loan facility of RM4m which was primarily occasioned by the cancellation of the purchase of the company's property did not and could not affect the validity of the charge instrument in A5. The consequence of non-disbursement only prohibited the respondent from relying on it in foreclosure proceedings, it did not and could not extinguish any claims of a debt due to the respondent by the applicant more so in light of

I exh A6, which was the charge to secure the overdraft and trade

facilities which had been partially disbursed and hence amounting to a debt due (see p 638D–E).

- (2) The applicant had expressly covenanted in cl 4.05 of exh A5 their liability notwithstanding cancellation of the purchase of the company's property by the company so long as there were outstanding monies due and owing by the company under the charge, but also to any other charge which must include any outstanding monies due under the second charge. The cumulative effect of cl 4.05 disentitled the applicant to a discharge of the charge created on the charged properties so long as there were outstanding amounts owing by the company, which outstanding amount had been conclusively established by the respondent in the form of the statement of account exhibited as A8 in encl 5 (see p 638E–F, H–I).
- (3) On the point of non-compliance with the conditions precedent the applicant's complaint could not be sustained by reason of the fact that in both the loan agreement and the charge annextures there was express provisions of waiver of conditions precedent to draw down. The combined effect of the clauses (s 6.02 of the loan agreement in exhs A1 and A2, and s 9.03(a) and (c) of both the annextures to the charge in exhs A5 and A6, encl 5) clearly entitled the respondent to waive any of the conditions precedent in the disbursement of the loan as provided for in the loan agreement which must include the condition precedent regarding the charge over the company's property (see pp 639E, 640A).
- (4) Even if there was no such waiver clause, the sequence of events herein clearly showed that the non-fulfillment of the furnishing of security was solely the company's own doing — as they were the ones who terminated the sale and purchase agreement and hence aborted the purchase of the property — the respondent never played any part nor participated, encouraged or induced the abortment of the sale and hence could not be imputed any blameworthiness pertaining to the non fulfillment of the conditions precedent (see p 640D–E).
- (5) The second legal charge exhibited as A6 in encl 5 was still good and valid as the undisputed outstanding amount under the overdraft and trade facility still remained. There could not be a discharge until full settlement was affected (see p 640F).

[Bahasa Malaysia summary]

Responden bank telah memberikan satu kemudahan pinjaman berjangka berjumlah RM4 juta dan satu kemudahan overdraf dan dagangan berjumlah RM3.25 juta kepada sebuah syarikat bernama HC Industries Sdn Bhd ('syarikat tersebut'), dan sebagai jaminan oleh itu memperoleh gadaian-gadaian pihak ketiga ke atas tanah pemohon yang dipegang di bawah EMR 1112 Lot 983 Mukim Kota

- A** Tinggi, Daerah Kota Tinggi, Johor ('hartanah yang digadaikan tersebut'). Perjanjian pinjaman dan gadaian-gadaian tersebut telah disempurnakan pada 9 September 1996. Ia merupakan satu terma dalam perjanjian pinjaman tersebut bahawa syarikat tersebut juga akan memberikan sebagai jaminan, hartanah yang dipegang di bawah HS(D) 177837 Lot PTD 52060 Mukim Tebrau ('hartanah syarikat tersebut'). Hanya kemudahan overdraf dan dagangan telah digunakan (dalam bulan September 1996) sejumlah RM750,000. Syarikat tersebut telah gagal untuk membayar balik kemudahan overdraf dan dagangan tersebut dan responden telah mendapatkan penghakiman terhadap pemohon untuk baki tertunggak kemudahan overdraf dan dagangan tersebut berjumlah RM952,122.49 setakat bulan Mac 2001, seperti mana dinyatakan dalam penyata akaun yang diekshibitkan sebagai A8 dalam lampiran 5. Pemohon-pemohon telah memohon terutamanya untuk satu pelepasan dua gadaian ke atas hartanah yang digadaikan tersebut dan pemulangan suratikatan hakmilik. Pemohon berhujah bahawa kegagalan memberikan jaminan ke atas hartanah syarikat tersebut melepaskan hartanah yang digadaikan tersebut daripada kekal sebagai jaminan, memandangkan bahawa perjanjian pinjaman tersebut dengan nyata memperuntukkan bahawa pembayaran pinjaman tersebut adalah tertakluk kepada, antara lain, pra syarat memberikan jaminan kepada hartanah syarikat tersebut. Persoalannya adalah sama ada pembatalan pembelian hartanah syarikat tersebut oleh syarikat tersebut melepaskan gadaian pemohon atas hartanah yang digadaikan tersebut untuk menjamin kemudahan pinjaman berjangka dan kemudahan overdraf dan dagangan tersebut.

F **Diputuskan**, menolak permohonan dalam lampiran 3 tersebut:

- (1) Berhubung kesahihan gadaian pertama dalam eksh A5, pembayaran yang tidak dibuat kepada kemudahan pinjaman berjangka berjumlah RM4 juta akibat pembatalan belian hartanah syarikat tersebut tidak akan dan tidak boleh memberi kesan kepada kesahihan instrumen gadaian dalam A5. Akibat daripada kegagalan membuat pembayaran kemudahan tersebut hanya menghalang responden daripada bergantung kepadanya dalam prosiding halang tebus, ia tidak akan dan tidak boleh melunaskan apa-apa tuntutan satu hutang yang tertunggak kepada responden oleh pemohon lebih-lebih lagi berdasarkan A6, yang merupakan gadaian untuk menjamin kemudahan overdraf dan dagangan yang telah dibayar sebahagiannya dan justeru itu membentuk satu hutang yang tertunggak (lihat ms 638D–E).
- G**
- (2) Pemohon dengan nyata diwaadkan dalam kl 4.05 eksh A5 tentang liabiliti mereka walaupun terdapat pembatalan belian hartanah syarikat tersebut oleh syarikat tersebut selagi terdapat hutang yang masih tertunggak dan tidak berbayar oleh syarikat tersebut di bawah gadaian tersebut, tetapi juga termasuk mana-mana gadaian lain yang semestinya mesti termasuk hutang yang masih
- H**
- I**

tertunggak di bawah gadaian kedua. Kesan kumulatif kl 4.05 tidak melayakkan pemohon kepada satu pelepasan gadaian yang dibentuk atas hartanah yang digadaikan selagi terdapat jumlah yang tertunggak oleh syarikat, di mana jumlah yang tertunggak telah dibuktikan secara konklusifnya oleh responden dalam bentuk penyata akaun yang diekshibitkan sebagai A8 dalam lampiran 5 (lihat ms 638E–F, H–I).

- (3) Berhubung perkara ketidakpatuhan dengan pra syarat-pra syarat tersebut, aduan pemohon tidak boleh dikekalkan oleh sebab kedua-dua perjanjian pinjaman dan lampiran gadaian tersebut mempunyai peruntukan yang nyata tentang penepian pra syarat-pra syarat yang dibangkitkan. Kesan gabungan klausa-klausa tersebut (s 6.02 perjanjian pinjaman dalam ekshibit-ekshibit A1 dan A2 dan s 9.03(a) dan (c) dalam kedua-dua lampiran kepada gadaian dalam ekshibit-ekshibit A5 dan A6, lampiran 5) dengan nyata memberi hak kepada responden untuk mengeneipkan apa-apa pra syarat dalam pembayaran pinjaman sebagai mana yang diperuntukkan dalam perjanjian pinjaman dan semestinya termasuk pra syarat berhubung gadaian ke atas hartanah syarikat (lihat ms 639E, 640A).

- (4) Walaupun tidak terdapat klausa penepian, rentetan kejadian di sini dengan nyata menunjukkan bahawa ketidakpatuhan memberikan jaminan tersebut adalah semata-mata perbuatan syarikat tersebut sendiri — kerana ia yang menamatkan perjanjian jual beli tersebut dan justeru itu membantutkan belian hartanah tersebut — responden tidak pernah memainkan apa-apa bahagian mahupun terlibat, menggalak atau mempengaruhi pembantutan jualan tersebut dan justeru itu tidak boleh dikatakan menyebabkan apa-apa perbuatan yang patut disalahkan berhubung ketidakpatuhan pra syarat-pra syarat tersebut (lihat ms 640D–E).

- (5) Gadaian yang kedua yang diekshibitkan sebagai A6 dalam lampiran 5 adalah masih baik dan sah memandangkan jumlah tertunggak yang tidak dipertikaikan di bawah kemudahan overdraf dan dagangan masih kekal. Tidak mungkin berlaku pelepasan sehingga penyelesaian penuh dihasilkan (lihat ms 640F).]

Notes

For cases on security for advances, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1422–1555.

Cases referred to

BBMB v Lektron Corp Sdn Bhd & Ors [1992] 2 CLJ 176 (refd)
Ban Hin Lee Bank v Jashbhai Nagibhai Patel [1992] 2 CLJ (Rep) 161 (refd)

- A** *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (refd)
Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor [1988] 2 MLJ 471 (refd)
Muniandy all Thamba Kaundan & Anor v D&C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)
- B** *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (refd)

Legislation referred to

Bankers Books (Evidence Act) 1949 s 3

Contracts Act 1950 s 32

C

T Rajasekaran (T Raja & Co) for the applicant.

Cheah Soo Chuan (Lee Hishammuddin) for the respondent.

- D** **Syed Ahmad Helmy JC:** The facts herein are fairly straightforward. The respondent bank granted two facilities — a term loan facility of RM4m and an overdraft and trade facility of RM3.25m to a company called HC Industries Sdn Bhd ('the company'), and as security therefore, obtained two third party legal charges over the applicant's land held under EMR 1112 Lot 983 Mukim Kota Tinggi, Daerah Kota Tinggi, Johor ('the charged property'). It was a term of the loan agreement that the company was also to furnish as security the property held under HS (D) 177837 Lot PTD 52060 Mukim Tebrau ('the company's property') over which the company had executed a sale and purchase agreement dated 19 July 1996, but aborted same some two years later in August 1998.
- E**

- F** The loan agreement by the company and the charges by the applicant were all executed on the same day, ie 9 September 1996 and both the company and the applicants had common directors in the form of Yong Kin Feng and Yong Fui Lim.

- G** The term loan facility of RM4m was not utilized by the company but the overdraft and trade facility was partially utilized by the company in September 1996 in the sum of RM750,000. It is not disputed that the company has defaulted in the payment of the said sum of RM750,000 and for which the respondent has obtained judgment in Guaman Sivil No 22-769-1998 on 6 February 2001. The respondent had demanded from the applicant the outstanding sum owing under the overdraft and trade facility which, as at 27 March 2001, stood at RM952,122.49 as per the statement of account exhibited as A8 in encl 5.
- H**

- I** The applicant's application in encl 3 is essentially for a discharge of the two charges over the charged property by the respondent and the return of the title deeds. The main thrust of the applicant's case is founded on their contention that since the terms of the loan agreement expressly subjects the disbursement to the condition precedent of the furnishing of the security and the charged property, the failure to obtain security over the company's property discharges the charged property from remaining as a security. It is the applicant's case that the obtaining of the company's property as security

is a contingent condition pursuant to s 32 of the Contracts Act 1950 and relies on the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211.

A

The issue for determination is whether the cancellation of the purchase by the company of the company's property discharges the applicant's charge of the charged property to secure the term loan facilities of RM4m and the overdraft and trade facilities of RM3.25m.

B

In respect of the charge to secure the term loan facility of RM4m, it is important to note that cll 1.02 and 1.03 of the annexure to the charge which was exhibited as A5 in encl 5 ('the first charge') clearly provides that the creation of the charge was in consideration of the term loan facility of RM4m under the loan agreement exhibited as A1 in encl 5. It is not disputed that both exhs A1 and A5 were executed on the same date.

C

The question arises on whether the non-disbursement of the loan under the loan agreement in exh A1 affects the validity of the first charge in exh A5.

The answer in my judgment is an emphatic no. The non-disbursement of the term loan facility of RM4m, which is primarily occasioned by the cancellation of the purchase of the company's property, does not and cannot affect the validity of the charge instrument in A5. The consequence of non-disbursement only prohibits the respondent from relying on it in foreclosure proceedings. It does not and cannot extinguish any claims of or debt due to the respondent by the applicant, more so in the light of exh A6 which is the charge to secure the overdraft and trade facilities ('the second charge') to secure the overdraft and trade facilities which has been partially disbursed and hence amounting to a debt due.

D

E

In point of fact, the applicant has expressly covenanted in cl 4.05 of exh A5 their liability notwithstanding cancellation of the purchase of the company's property by the company so long as there are outstanding monies due and owing by the company under the charge, but also to any other charge which must include any outstanding monies due under the second charge, which also contains similar provisions.

F

Clause 4.05 which is present in both exhs A5 and A6 is reproduced hereunder:

G

Section 4.05 Consolidation

Section 245 of the National Land Code (restricting the right of consolidation) shall not apply to this security and it is hereby expressly agreed and declared that unless the Bank otherwise agrees the charge created hereunder shall not be discharged except on payment by the chargor of not only all moneys and liabilities secured hereunder but also all moneys secured by any other charge created by the chargor in favour of the Bank.

H

Thus, the cumulative effect of cl 4.05 thereof disentitles the applicant to a discharge of the charge created on the charged properties so long as there are outstanding amounts owing by the company which outstanding amount has been conclusively established by the respondent in the form of the statement of account exhibited as A8 in encl 5, which is according to the

I

- A** provision of s 3 of the Bankers Books (Evidence Act) 1949, prima facie evidence of the debt due and owing by the company. The statement of account was issued pursuant to cl 3.02 appearing in both the charges in A5 and A6, encl 5, which reads as follows:

Section 302 — Certificate of outstanding balance

- B** A certificate signed by any of the authorized officers of the Bank as to the aggregate principal amount of the advances under the facility outstanding, interest thereon and any other moneys and liabilities owing or payable under the provisions of the security documents or intended to be hereby secured at any time hereafter shall be conclusive and binding on the chargor save and except for any manifest error.

- C** A similar clause which came up for determination in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 was held by Raja Azlan Shah CJ (Malaya) (as His Majesty then was) to mean that for the purpose of fixing liability of the borrower, the borrower's indebtedness may be ascertained conclusively by a certificate.

- D** The inconclusiveness of the statement of account can only be challenged if there is manifest error — here there is no evidence whatsoever nor any challenge by the applicant as to any manifest error, and hence the amount of indebtedness has been conclusively established and binding on the applicant — *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471.

- E** On the point of non-compliance with the conditions precedent, the applicant's complaint cannot be sustained by reason of the fact that in both the loan agreement and the charge annexures, there were express provisions of waiver of conditions precedent to draw down.

- F** Section 6.02 of the loan agreements, appearing in exhs A1 and A2, provides as follows:

Section 6.02 — Waiver of conditions precedent to drawdown

- G** It is hereby expressly acknowledged and declared that the conditions contained herein are inserted for the benefit of the Bank and may therefore be waived wholly or in part by the Bank at its sole and absolute discretion without prejudicing the Bank's rights and such waiver shall not prejudice the Bank from insisting on the Borrower's compliance with any such waived conditions precedent at any subsequent period as the Bank may think fit and necessary.

Section 9.03(a) and (c) of both the annexures to the charge in exhs A5 and A6 encl 5 provides:

- H** Section 9.03 — Modification and Indulgence

The Bank may at any time and without in any way affecting the security hereby created:

- (a) determine or vary any of the terms and conditions contained in the loan agreement or any of the other security documents;
- I** (b) ...
- (c) deal with, exchange, release or modify or abstain from perfecting or enforcing any securities, guarantees or rights it may now or at any time or

from time to time hereafter have from or against the chargor or borrower or any security party or other persons.

A

The combined effect of the clauses aforesaid clearly entitles the respondent to waive any of the conditions precedent in the disbursement of the loan as provided for in the loan agreement, which must include the condition precedent regarding the charge over the company's property. Such waiver clauses have been upheld by our courts — *BBMB v Lektron Corp Sdn Bhd & Ors* [1992] 2 CLJ 176; *Citibank NA*.

B

The applicant's attempt to rely on the Federal Court case of *Muniandy a/l Thamba Kaundan & Anor v D&C Bank Bhd & Anor* [1996] 1 MLJ 374 to refute intention to waive, cannot be sustained for the obvious reason that the applicant herein is not an ignorant layperson who knew nothing of their legal rights. The applicant is a business entity who shares common directors with the company. The common directors in the form of Yong Kin Feng and Yong Fui Lin are seasoned businessmen who executed the loan agreement on behalf of the company and the charge documents on behalf of the applicant, and hence they cannot be said not to know the terms and the effect of the documents they executed. Directors are the alter ego of business entities — *Ban Hin Lee Bank v Jashbhai Nagibhai Patel* [1992] 2 CLJ (Rep) 161; *BBMB v Lektron Corp Sdn Bhd*.

C

D

Even if there is no such waiver clause, the sequence of events herein clearly shows that the non-fulfilment of the furnishing of the security was solely the company's own doing — as they were the ones who terminated the sale and purchase agreement and hence aborted the purchase of the property — the respondent never played any part nor participated, encouraged or induced the abortment of the sale, and hence cannot be imputed with any blameworthiness pertaining to the non-fulfilment of the conditions precedent.

E

F

In respect of the second legal charge exhibited as A6 in encl 5, it is still good and valid as the undisputed outstanding amount under the overdraft and trade facility still remains, and it follows that there cannot be a discharge until full settlement is effected.

Before concluding, I would also like to point out that the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 is not supportive of the applicant's contingent liability contention for the obvious reason that unlike the FIC approval which was a condition precedent in that case, the charge here is not a contingent contract, it being a security intended to secure the overdraft and trade facility. Further, unlike that case, there are express waiver provisions here.

G

H

For the reasons aforesaid, I dismissed the applicant's application in encl 3 with costs.

Application in encl 3 dismissed.